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No. 964

In the

Supreme Court of the United States

October Term, 1964

WELFARE FINANCE CORPORATION
and
NATIONAL FACTORS, INC.,
Petitioners,

vs.

TANENBAUM TEXTILE CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

Petitioners' statement of the questions presented is misleading. They attempt to create the impression that the problem involves the failure of the Ohio Courts to follow federal law, particularly the provisions of the Assignment of Claims Act. There is no conflict between federal law and state law involved in this case. The Ohio Courts fully recognized that the validity of the assignments was depend-

ent exclusively on the Assignment of Claims Act and that the act controlled to the extent it purports to do so. The decisions below merely held that the Assignment of Claims Act, as amended, was not determinative of the priorities, equities and rights between these two parties under the facts of the case.

Therefore, a more accurate statement of the question presented is whether the Ohio Court's interpretation of the operative effect of the Assignment of Claims Act, under the specific facts of this case, is in conflict with federal law.

CONSTITUTIONAL PROVISIONS INVOLVED

No constitutional question is involved.

STATEMENT OF THE CASE

To present a true picture, a more complete presentation of the facts should be given. Some facts, for the most part completely ignored by petitioners, may be concisely summarized as follows:

(a) Petitioners' entire claim is based upon advances of one and a quarter million dollars allegedly made to another subcontractor *after* the government contracts were terminated and all work thereon ordered stopped.

(b) Petitioners had given respondent a written guarantee to pay the indebtedness of the prime contractor to respondent.

(c) There is nothing due or owing from the prime contractor to petitioners, the latter having fully released and discharged the prime contractor.

(d) The petitioners, after the assignments referred to in the petition and after commencement of this litigation, purchased all of the prime contractor's claims against the government so that it cannot claim under its original assignments as a lender.

(e) Throughout the whole proceedings (from the receipt by petitioners of the money in 1960 until the filing of an amended answer in 1963, almost two years after institution of the action) petitioners represented to respondents and to the Army that they were mere stakeholders of the money, retaining the funds only until an alleged claim (which was subsequently conceded to be non-existent) by the prime contractor against respondent was resolved.

(f) Petitioners received the money by virtue of contracts, agreements and procedures prescribed by the Armed Service Procurement Regulations, which money, in accordance with such contracts, agreements and regulations, was expressly earmarked for and directed to be paid over to the respondent.

A more detailed statement of the facts, set forth as succinctly as is possible to enable a proper consideration of the case, is as follows:

The contracts herein involved, all agreements, the termination proceedings, and all matters pertaining thereto are governed and controlled by the Armed Services Procurement Regulations (usually abbreviated and hereinafter called ASPR), 32 C.F.R. Parts 1-39 issued under authority of 5 U.S.C. § 22 and U.S.C. § 2301.2314. The provisions of the regulations relevant to the problems under discussion are set forth in the Appendix.

The four contracts entered into in 1955 between the United States and the prime contractor, the Douglas Corporation, contained specific provisions with respect to termination, as prescribed by ASPR. In Item 39 j it is expressly provided that the Government "may" make a partial payment (which is involved here) "under such terms and conditions" as the Government may prescribe. In Item 40, it is provided that if the contract should be terminated the prime contractor "shall pay" to subcontractors (respondent was a subcontractor of Douglas) the amount due them.

It is also provided that the "obligation to make payment" to the respondent is subject only to the right of the prime contractor to deduct any amount which might then be due to him from the subcontractor. With petitioners' repudiation in 1963 of their prior claims and their abandonment of their original defense that Douglas claimed a "set-off" against respondent, the "obligation" of the prime contractor to pay respondent under the provisions of Item 40 would be absolute and subject to no exceptions.

It was admitted by respondent, throughout the proceedings, (in fact, stipulated) that the prime contractor assigned the proceeds to petitioner, National Factors, and that National Factors had complied with the provisions of the Assignment of Claims Act, as amended.

The prime contractor, the Douglas Corporation, subcontracted with a company, U. S. Display, to make the ponchos, and with respondent to furnish the cloth. At the same time, the petitioners, jointly and severally, by written agreement, guaranteed the payment by The Douglas Corporation of the latter's "indebtedness" to respondent for "merchandise sold or advanced" under this sub-contract.

Merchandise was supplied by respondent but in March, 1957, the government terminated the contract for its convenience. Up to this point, petitioner, National Factors, had advanced $281,588.00. All of this money was paid by petitioner to U. S. Display but charged to Douglas by virtue of a letter from Douglas authorizing advances to U. S. Display until "the contracts were completed."

Upon the termination of the contracts, the government made written request upon the prime contractor to settle all claims of subcontractors as promptly as possible. (§ 8.-801-2 Appendix 4a) Thereafter, the Douglas Corporation (in accordance with ASPR, §§ 8.207; 8-208-3, Appendix 1a, 2a) submitted to the government the respondent's settlement

proposals. Each of such proposals contained the Douglas Corporation's express promise and agreement that:

> "Upon receipt by the contractor of amounts covering settlements with its immediate subcontractors, the contractor will pay or credit them promptly with the amounts so received."

To enable the prime contractor and the government to negotiate a settlement of respondent's claims, respondent was requested to surrender all its inventory to the United States. However, before doing so, respondent was given written assurance by petitioners that any money petitioners might receive as assignee of Douglas would be paid over to respondent. In their letter assuring respondent that it would be paid, petitioners not only cited the provisions of the proposed settlement contract with the government (called Modification) which required payment to the subcontractor within ten days of the receipt of the money by petitioners, but also referred to petitioners' "commitments" (i.e. their written guaranty) to pay to respondent any indebtedness of Douglas to it. With such assurance, respondent surrendered its inventory to the government.

First a partial settlement(in the sum of $180,420.62) of respondent's inventory claim was agreed upon by Douglas and the United States (Modification #4). Of this, the government retained ten percent ($18,042.06) and the remainder ($162,378.56) was paid to petitioners, who thereupon paid respondent. It might be mentioned here that under ASPR, payments by the government are rarely made directly to a subcontractor but, as stated in these regulations, are made to the subcontractor "*through*" or "*effected through*" the prime contractor (or its assignee) (§§ 8.208-1, 8.208-7, 8.212-1, Appendix 1a, 2a, 3a).

Thereafter, the government and Douglas agreed upon an amount to be paid in settlement of all the remainder of

respondent's claim (including the claims of its subcontractors who were to be paid by respondent). The government and the Douglas Corporation entered into a final written settlement agreement of all respondent's (and its subcontractors') claims (Modification #6). This settlement agreement is headed:

"FINAL SUPPLEMENTAL AGREEMENT OF SETTLEMENT
for
SUBCONTRACTORS NAMED HEREIN"

The Government and Douglas agreed that respondent (a subcontractor named therein) was entitled to a total amount of $244,953.28 from which was to be deducted the $162,378.56 previously paid, leaving a balance of $82,524.22. Broken down in round figures, the $82,524.72 figure represented: (a) $20,000.00 still due respondent for inventory which it had surrendered to the United States Government; (b) $36,713.97 for claims (inventory, costs, expenses and allowances) of respondent's subcontractors, Standard Coated Products and Electro-Plastics, which respondent would be obligated to pay to these companies upon receipt of the money: (c) $8,000.00 for respondent's administrative expenses; (d) $12,000.00 for attorney and accountant fees and expenses incurred by respondent in processing the claim through the government (e) $6,000.00 profit.

The government, following customarily prescribed procedure, made the payment to the respondent "through" the prime contractor's assignee. But, prior to the payment and as a condition thereto, the prime contractor was required to and did unequivocally agree (Article 5 of Modification #6):

> "the *contractor shall, within ten* (10) *days* after the receipt of the payment provided for hereunder, *pay to each* of its *immediate subcontractors* . . . the re-

> spective amounts to which they are entitled by this settlement agreement." (emphasis supplied)

There was only one exception — Douglas was authorized to deduct any amount due it from respondent.

Petitioner, National Factors, did not turn over this $82,524.72 received in 1960, to the respondent. The sole reason assigned by petitioners for not paying respondent immediately was that the Douglas Corporation claimed some "set-off" against the respondent. When the Army subsequently wrote to inquire why the "just demands" of respondent to this money were not being met, the Army was informed that payment to respondent was being held up pursuant to this Article 5 of Modification #6 because of a "set-off" by Douglas.

Prior to the institution of suit by respondent in 1961, the attorneys for respondent were expressly told by petitioners that they were mere "stakeholders" but could not pay respondent until the claim made by Douglas against respondent was resolved.

After suit was filed in 1961, the petitioners by their sworn statements in their answer admitted that

> "a final supplemental agreement of settlement was entered into by the United States Government, Douglas and National Factors"

and further swore to the fact that the payment was not made to respondent

> "by reason of said claim of Douglas Corporation they may be compelled to make a double payment."

As heretofore stated, only $281,588.70 had been advanced by petitioners up to the time of the termination of the contract. Since the termination, petitioners have retained from money received from the government a total of $550,-

500.10 or $268,914.40 in excess of the amount of advances up to the time when the contracts were terminated.

After the contracts were terminated, petitioners continued to advance large sums of money to U. S. Display which were still charged to the Douglas Corporation. These advances, *after* the contract was terminated, amounted to $1,225,828.17.

In April, 1961, petitioners, by written agreement, purchased all Douglas' accounts against the United States. Douglas surrendered all its financial interest in all its claims against the government to petitioners, and petitioners, in consideration thereof, agreed to pay Douglas $50,000.00 (plus some additional compensation contingent upon petitioners' collecting from the government). Petitioners also fully released the Douglas Corporation of all claims which petitioners might have against Douglas.

No reference was made to this agreement in the answer filed by petitioners. In fact, upon petitioners' representations that the Douglas Corporation and U. S. Display were necessary parties, these two corporations were joined in the action. Later, in November, 1961, petitioners changed their minds as to U. S. Display and it was dismissed at their request. Finally, in January, 1963, petitioners requested the dismissal of the Douglas Corporation.

At all times, from July 18, 1960, when petitioner, National Factors, had received the money, until January 22, 1963, petitioners had acknowledged their obligation to pay respondent as soon as the alleged claim of Douglas Corporation was resolved. Then, after two and one-half years had elapsed after receipt of the money, petitioners came forth with an entirely new and different basis upon which to withhold payment to respondent. They filed an amended answer in which they repudiated all their prior claims -- completely abandoning any claim of a possible set-off by Douglas – and, for the first time, claimed that the

Assignment of Claims Act gave them priority over respondent.[1]

REASONS FOR DENIAL OF WRIT

1. At the outset, respondent reiterates that the Ohio Courts fully recognized the supremacy of the Federal law and, in no sense, ignored the Assignment of Claims Act. The Courts did not apply any common law principles which were in conflict with the Act. In fact, the Ohio holding is based primarily on the application of the Armed Services Procurement Regulations (Federal Regulations) to which the Ohio Courts also gave full effect. Therefore, the doctrine enunciated in cases cited by petitioners on pages 10 and 11 of their brief has no relevancy because the issue involved in those cases is not before this Court.

2. Respondent also calls to the Court's attention that, throughout the entire proceedings, respondent raised and fully argued various reasons why, under the facts peculiar to this case, the equities were all in favor of respondent. These should be considered and the case viewed in the light of all the facts in determining whether there are any special or important reasons to review this particular case. These facts will be more fully developed later in this brief.

3. Petitioners' argument has only one theme — that the

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[1] Matters set forth in petitioners brief relative to the Appeal of Douglas are entirely extraneous to the issues herein involved. It is, however, interesting to note that the total contract price for all the ponchos to be supplied under the four contracts was $2,106,034.43 (See Modification 6). Yet, petitioners advanced $1,507,413.87 of which, as heretofore stated, $1,225,828.17 was advanced after the contracts were terminated. Petitioners have already received $712,878.66 from the government and now, according to petitioners' brief, they (as assignees who have purchased Douglas' claims) are requesting another $2,300,000.00 from the government. In other words, they are seeking to have the government pay $3,000,000 whereas it would have paid only $2,000,000 if it had received the 462,478 ponchos provided for in the contract.

decision of the Ohio Court would be disastrous to lending institutions.

This argument completely ignores all of the following:

(a) In 1945, this Court decided that the Assignment of Claims Act was not designed to regulate the equities of claimants as between themselves. *McKenzie, Trustee in Bankruptcy* v. *Irving Trust Co.,* 323 U.S. 365 (1945).

(b) The Court of Claims, consistently and for several decades, has held that the Amendments to the Assignment of Claims Act were intended to do nothing more than remove the prohibition against assignments, and that an assignee under the Act acquires no greater rights than its assignor had. *Royal Indemnity* v. *United States,* 93 F. Supp. 891 (U.S. Court of Claims 1950); *National Surety Corp.* v. *United States, et al,* 133 F. Supp. 381 (U.S. Court of Claims, 1955).

(c) This Court has heretofore denied a writ of certiorari in a Court of Claims case wherein the same arguments were advanced as here. *National Surety Corp.* v. *United States, et al,* 133 F. Supp. 381 (1955), *certiorari denied,* 350 U.S. 902 (1955).

(d) Petitioners accepted this assignment subject to the provisions of ASPR and the terms and conditions of the original contracts.

It borders on the ridiculous for petitioners to urge this Court to review this case because of the alleged plight of the financial institutions. If the decision in this case would have such profound effect upon the financing of government contracts, why have the decisions of the Court of Claims, consistently (ever since 1944), denying priority to the assignee, not already brought about such confusion as claimed by petitioners? We are unaware of any calamitous results or of any cries of distress by either the government or lending institutions because of these decisions. Why would this Court, having heretofore been presented with

such an allegedly vital question, deny certiorari? Why have not the Armed Forces changed the Regulations? Why has not Congress been importuned to amend the Act to set aside the rulings of the Court of Claims and specifically to give the lending institutions priority over every one?

The fallacy of the argument is even more apparent when one considers that in this instance: (a) the money was advanced *after* the termination of the contract so that none of it was paid out to finance the performance of a government contract; (b) the petitioners no longer occupy the status of a lender or financer of a contract but have bought for themselves all of the contractor's claims; they voluntarily, and for their own purposes, released the debtor; (c) during the period from 1960 to 1963 petitioners by their own admissions, have conclusively evidenced their belief and understanding that they occupied a position inferior to respondent — their own conduct and admissions clearly indicate that they never advanced this money with any belief or thought that they would have priority over respondent; (d) the petitioners had, in fact, induced respondent to supply the materials on their guarantee of payment.

Petitioners' argument totally ignores the fact that the supplier of materials has a vital and indispensible role in the performance of government contracts. Cash means nothing if the materials are not available.

In every phase of the law, the laborer, materialman, and the artisan have been afforded special protection by various liens and other protective measures. They have been preferred over all other creditors. The concept of priority for the lender of money over the supplier of materials, advocated by petitioners, would constitute a revolutionary change in legislative and legal thinking.

The arguments made by petitioners should be addressed to the Armed Forces to amend its regulations, or to Congress to amend the Act — not to this Court to read into the

Act a purpose or effect not expressed therein. It should not ask this Court to set aside the provisions of ASPR and to ignore both the Regulations and the provisions of the contracts.

Because it is impossible to visualize any dire consequences arising out of the lower court's decision (particularly in view of all the facts and circumstances herein involved), there seems to be no special or important reasons for review by this Court. This being petitioners' sole basis upon which they seek review, their petition should be denied.

4. The State Courts, recognizing that the Assignment of Claims Act alone controlled as to the "validity" of these assignments, correctly held that the Act did not purport to regulate the equities and priorities of these parties to the fund. The Act, throughout, uses the words *"valid"* and *"validity"* — that an assignment to a financial institution in compliance with the requirements of the Act shall be *"valid"* and that its *"validity"* shall not be questioned. In every phase of the law of contracts and assignments, a clear distinction is made between "validity" and "operative effect." In legal treatises there are separate and appropriate chapter headings for each of these two separate and distinct questions. Under "Validity" are discussed "formal requisites, legality of object, capacity of parties, consideration, consent, delivery and acceptance." Under "Operative Effect" such questions as priorities and equities of the parties are covered.

e.g., 6 *C.J.S., Assignments,* Chapter III, Requisites, Modes and Validity, p. 1089; Chapter IV, Operation & Effect, p. 1136.

The word "assignment" has a definite connotation in law. With nothing whatever to indicate any contrary Congressional intention, the word should be interpreted and applied in accordance with its universally accepted meaning -- a transfer of nothing more than the assignor's interest

whereby the assignee acquires no greater right than was possessed by assigner. 6*Am. Jur.* (2d), *Assignments*, § 102, p. 282. This is what the Ohio courts did. No rule of law peculiar to Ohio was applied. Hence, petitioners' argument about subjecting an assignee's rights to 50 various state rules is without any substance or merit.[2]

This is further emphasized by the fact that the amendments to the Act give to the assignee certain specific protections but only against certain *claims of and by the United States* against the assignor, which are not herein involved. Because the Amendments carefully spell out and limit the nature, type and extent of these protections afforded the assignee, wherein his rights transcend the assignor's, it would seem apparent that only one conclusion is possible. In all cases, other than in those wherein these exceptions of claims of and by the United States are involved, the Act must be interpreted and applied in accordance with its specific language — that it regulates and controls only the "validity" of the assignment and that the word "assignment" is used in its accepted sense.

This Court declared in *McKenzie* v. *Irving Trust*, 323 U.S. 365, 369 (1945):

> "the provisions of the statute . . . are . . . not for the regulation of equities of the claimants as between themselves"

The holding of the Ohio Courts is nothing other than an application of this principle enunciated by this honorable Court, to the facts in this case.

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[2] Petitioners' footnote 12 regarding "validation" or "notice" requirements peculiar to some states clearly illustrates the fallacy of their claims. The Ohio Court, in recognizing that the Act alone determines "validity", would obviously and logically hold that such state "validation" or "notice" requirements could not affect the "validity" of an assignment made pursuant to the Act. Petitioners thus provide examples of the distinction between "validity" and "operative effect."

5. In none of the petitioners' citations are there any facts analogous to those herein presented. Not one of them involves: (a) ASPR termination proceedings; or (b) a payment made by the government specifically for and in settlement of the subcontractor's claim and for his benefit; or (c) a payment made only if certain conditions precedent were first complied with; or (d) definite agreements by the prime contractor for the subcontractor's benefit prior to such payment. To accentuate the inappropriateness of these decisions, there are additional facts in our case, all of which we raised in our arguments in the lower courts, namely (1) the alleged claim of petitioners predicated upon advances made *after* contract termination, (2) the guaranty by petitioners, (3) the release by petitioners of the assignor; (4) estoppel.

6. There is substantial legal authority holding that the assignee under the Act does not have priority even though none of these additional facts, which make this case unique, were present.

In *Hardin County Savings Bank* v. *United States*, 65 F. Supp. 1017, 1022 (U.S. Court of Claims 1946) the Court stated:

> "We have examined the history of the Act and find nothing in it which shows that . . . Congress intended anything more than that an assignee should 'stand in the shoes' of the assignor and that an assignment made in conformity with the Act should not be declared invalid because of the provisions of R. S. Sections 3477 and 3737 . . ."
>
> "It would require clear and specific language to justify the conclusion that Congress intended by the Act of 1940 to legislate to the contrary."

Again in *Royal Indemnity* v. *United States,* 93 F. Supp. 891, 895 (U.S. Court of Claims 1950) the Court said,

> "It has been the holding of this Court that an assignee under the 1940 Act acquires no greater right than its assignor (the contractor) had . . .
> ". . . the long established principle that an assignee . . . takes only the interest of the assignor was not legislated away by the 1940 Act."

To the same effect, see *Modern Industrial Bank* v. *United States,* 101 U.S. Court of Claims 808 (1944).

And, in *National Surety Corporation* v. *United States, et al,* 133 F. Supp. 381 (U.S. Court of Claims, 1955), the case in which the Supreme Court denied certiorari, 350 U.S. 902, (1955) the Court said (p. 385):

> "We reiterate what we have said in prior cases that the 1940 amendment . . . was intended to do nothing more than to remove the prohibition against assignment of a claim against the United States in the case of a financial institution lending money to a contractor with the government.
> "Notwithstanding the passage of the amendment, the issue since its passage is the same as when [prior cases] were decided, to wit, who has the superior equity . . ."

Once again, attention might be called to *McKenzie* v. *Irving Trust,* 323 U.S. 365 (1945).

The legislative history of the act and amendments thereto fails to give any support to petitioners' claims but, to the contrary, reinforces respondents' position. Comments made in committee hearings regarding the 1940 amendment (the only one herein involved)[3] evidence a congressional pur-

[3] The 1951 amendment was designed merely to clarify the 1940 amendment with reference to claims *of* and *by the United States* because of certain rulings by the Comptroller General between 1940 and 1951. Hence, discussion of the 1951 Amendment is, in fact, irrelevant.

pose merely to permit assignments to financial institutions which previously had been prohibited. 86 *Congressional Record* 12559, 13122.

7. Under ASPR (§ 8.212-1(b), Appendix 4a) any payment prior to a final settlement of all claims is purely discretionary with the Army. As provided in any contract under ASPR, such payment will be made only "under such terms and conditions" as the government may prescribe (Item 39j).

Furthermore, under § 8.212-1(b) (Appendix 4a) the subcontractor must, as a general rule, be paid by the prime contractor before the Army will make payment. Sometimes (as here) payment will be made by the government specifically for a subcontractor's benefit in which event the payment will be made "to the subcontractor *through* the prime contractor." And, to implement this provision, the settlement agreement between the government and the prime contractor specifically requires payment to the subcontractor within ten days after receipt of the money by the prime contractor. Under governmental construction contracts, the materialman is protected by a bond (Miller Act). In ASPR no bond protection is afforded the supplier of materials. But, to provide some type of protection customarily given to laborers and suppliers of materials, ASPR contains these specific covenants to assure the subcontractor of being paid.

We believe, therefore, it is evident, from the reading of the Regulations that the contractor (or his assignee) is merely the instrument, agent or conduit through whom the payment to the subcontractor is made. Further, the contractor (or his assignee) has no right to and will not receive any money except on the express condition that it will be turned over to the subcontractor. There is no question that the money was unequivocally earmarked for respondent's benefit; that the contractor (or his assignee whose rights can not be greater than the assignor's) has no

right or privilege to keep or to use the money except to pay the subcontractor. The subcontractor is the real (third party) beneficiary of the contract.

8. The state courts were, then, correct in holding that petitioners received the money under the same conditions and subject to the very same obligations that were imposed on assignor. The assignee was not entitled to receive anything which would not be payable to the assignor; if the assignor's right to receive the money was subject to express conditions and obligations for respondent's benefit and protection, so was the assignee's.

Petitioners, at all times, knew (or were presumed to know) that their rights were subject to, limited and controlled by: (a) the provisions of ASPR, (b) the terms and conditions of the prime contracts, and (c) the covenants of the Douglas Corporation (prescribed by ASPR) in the settlement proposals and in Modification 6, which were a condition precedent to any payment by the government.

Therein lies the fallacy of petitioners' argument about subjecting the "collateral" to "after acquired equities." The "equities" of respondent have their inception in the provisions of the Regulations and in the prime contract which preceded the assignments. Petitioners' attempt to argue that the covenants in Modification 6 were "after" the assignment completely ignores the fact that such covenants were prescribed by and in strict conformity with the Regulations (§§ 8.209-1; 8.806-1; 8.806-3, Appendix 3a, 5a, 6a); that petitioners knew (or were presumed to know) at the time of the assignments, that such provisions and covenants would be incorporated in any settlement agreement if the prime contracts were terminated. Such argument disregards the fact that petitioners knew that the government was not required to make and would not make any payment without such covenants; they fully realized that payment by the government was based on and induced by the definite

promise that respondent would receive the money within ten days.[4]

Petitioners reference to the Ohio Courts' holding being a "premature" state court determination ignores the fact that the parties voluntarily entered into Modification 6 for the specific and sole purpose of settling and paying respondent's claim. Undoubtedly, petitioners were concerned and anxious to get the government to settle respondent's claims to protect them against any possible loss as a result of their guarantee to respondent.

9. Respondent advanced other arguments in the Ohio Courts. Petitioners' claim of indebtedness of Douglas to them is entirely contrary to fact. They fully released Douglas. Douglas owes them nothing. Petitioners, by their conduct and their avowals, induced respondent to surrender all its inventory. They misled the Army which, had it been apprised of any such claims as petitioners are now making, may have taken other action to protect respondent. Hence, estoppel can be invoked by respondent. Petitioners were guarantors of Douglas' indebtedness to respondent. Yet, despite such guaranty, they now seek to appropriate for themselves money they received from the government for the sole purpose of paying off Douglas' indebtedness to respondent (the very thing which they had guaranteed would be paid).

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[4] In their footnote 19, petitioners seemingly concede that under ASPR respondent is entitled to the money. They merely find "the government's ability to *control* the disposition of the money startling." Nothing in the Act or amendments thereto expressly or impliedly prohibits the government from affording this protection to subcontractors. The express provisions of the Amendments relating solely to liabilities of the contractor *to* the government certainly can not be interpreted to apply to claims of a subcontractor against the contractor.

CONCLUSION

On the facts presented, the Ohio courts correctly interpreted the effect of the Assignment of Claims Act, as amended. There is no question that the money was paid out for one purpose only — to reimburse respondent. It was clearly ear-marked for respondent's benefit. There is nothing whatever in the Assignment of Claims Act to indicate that, under such circumstances, Congress intended that an assignee should be entitled to appropriate such fund for its own use and to deprive respondent of money which, by the application of any equitable principles, is rightly its. The correctness of the decision is further emphasized by petitioners' inconsistencies, their prior conduct and admissions, their contrary-to-fact claims, and their guarantee.

Petitioners have no legal, moral or equitable claim on these funds. But aside from the correctness of the decision, there is nothing in this one case of any public or general interest to warrant further review.

We respectfully submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CODE OF FEDERAL REGULATIONS
TITLE 32 – NATIONAL DEFENSE

§ 8.207 **Audit of settlement proposals and of subcontract settlements.**

* * *

(b) Subcontract settlements submitted by the prime contractor to the contracting officer for approval or ratification in accordance with § 8.208 shall be referred to the cognizant audit agency for review and recommendations if (1) the settlement involves $25,000 or more; or (2) the contracting officer considers an audit, in whole or in part, desirable. The audit agency shall submit a written report and recommendations to the contracting officer, in accordance with Departmental proced[illegible]es.

§ 8.208 **Settlement of subcontract claims.**

§ 8.208-1 **Subcontractor's rights.**

A subcontractor has no contractual rights against the Government upon the termination of a prime contract. The rights of a subcontractor are against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the termination claims of immediate subcontractors.

§ 8.208-3 **Settlement procedure.**

• • •

(c) The contracting officer shall promptly examine such subcontract settlement required to be submitted to him (including the basis and form of the proposal upon which the settlement was based) to satisfy himself that the subcontract termination was made necessary by the termination of the prime contract, and that the settlement was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract (or if allocable only in part, that the proposed allocation is reasonable). In considering the reasonableness of any subcontract settlement, the contracting officer shall be guided generally by the provisions of this part relating to the settlement of prime contracts, and shall comply with any applicable requirements of §§ 8.207 and 8.211 relating to audit and review. Upon completion of the examination, the contracting officer shall notify the contractor in writing of (1) his approval or ratification, or (2) his reasons for disapproval.

§ 8.208-7 **Government assistance in settlement of subcontracts.**

In unusual cases the contracting officer may determine that it is in the best interests of the Government to offer assistance to the prime contractor in the settlement of a particular subcontract. Such a situation may exist when the prime contractor has made all reasonable efforts to negotiate the settlement without success and the contracting officer believes that with the assistance of the Government a settlement can be reached. Such assistance shall be furnished only with the consent of the prime contractor. In such cases, an agreement may be entered into by the Government, the prime contractor, and a subcontractor,

covering the settlement of one or more subcontracts. In any such case, payment to the subcontractor shall be effected through the prime contractor as part of the overall settlement with the latter.

§ 8.209 **Settlement agreements.**

§ 8.209-1 **General**

When a settlement has been negotiated with respect to the terminated portion of a contract, and all required reviews have been obtained, the contractor and the contracting officer shall enter into a settlement agreement, substantially in the form set forth in the appropriate subparagraph of § 8.806. The settlement shall cover (a) any setoffs and counterclaims which the Government may have against the contractor and which may be applied against the terminated contract, and (b) all claims of subcontractors, except claims which are specifically excepted from the agreement and reserved for separate settlement.

§ 8.212 **Payment.**

§ 8.212-1 **Partial payments upon termination.**

(a) **General.** If the contract authorizes partial payments on termination claims prior to settlement, a fixed-price prime contractor, or a cost-reimbursement prime contractor whose settlement proposal includes costs, may request such partial payments in the form set forth in § 8.802-10 [a facsimile of each of the forms have been filed with the Federal Register Division] at any time after submission of interim or final settlement proposals. Applications for partial payments shall be processed promptly. Partial payments to a subcontractor shall be made only through the prime contractor.

(b) **Amount of partial payment.** Before approving any partial payment requested by the contractor, the contracting officer shall have made such accounting, engineering, or other specialized reviews as he deems proper of the data required by this part to be submitted in support of the contractor's settlement proposals. If such reviews and the contracting officer's examination of the data indicate that the requested partial payment is proper, the contracting officer may, in his discretion, authorize payment as follows:

* * *

(2) An amount up to 100 percent of the amount of any subcontract settlement effected and paid by the prime contractor: **Provided,** The settlement has been approved or ratified by the contracting officer pursuant to § 8.208-3(c) or has been authorized pursuant to § 8.208-4;

* * *

(5) An amount up to 100 percent of partial payments made to subcontractors in conformance with this subparagraph. No partial payments shall be made on account of profit or fee which may be claimed with respect to the terminated portion of the contract. In exercising his discretion as to the extent to which partial payments shall be made, the contracting officer shall consider the diligence of the contractor in settling with its subcontractors and in preparing its own claim.

§ 8.801-2 **Letter notice of termination.**

* * *

2.(b) You shall give notice of termination to each of your immediate subcontractors (including suppliers) who will be affected by the termination of your contract. In such notice you shall (1) give him the number of your contract with the Government, (2) state that it has been terminated (or terminated in part, if that is the case) for the convenience of the Government, (3) give him the name

and address of the Contracting Officer, (4) instruct him to stop all work, to make no further shipments, to place no more orders, and to terminate all subcontracts under this contract with you (subject to the same exceptions stated in paragraph 2(a)), (5) direct him to submit his settlement proposal promptly in order to expedite settlement, and (6) request him to give similar notice and instructions to his immediate subcontractors.

* * *

7. **Settlements with subcontractors.** You remain liable to your subcontractors and suppliers for claims arising by reason of the termination of their subcontracts or orders. You are requested to settle such termination claims as promptly as possible. For purposes of reimbursement by the Government, such settlements will be governed by the provisions of 32 CFR Part 8.

§ 8.806 **Forms of settlement agreement.**

§ 8.806-1 **Settlement agreement for use in settling fixed-price prime contracts after complete termination.**

* * *

Art. 4. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate sub-contractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.

§ 8.806-3 **Partial settlement agreement, for use in settling fixed-price prime contracts after complete or partial termination where settlement pertains only to settlements with subcontractors.**

* * *

Art. 2. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate subcontractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.